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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 191

NATURAL GAS PIPELINE COMPANY OF AMERICA, *Appellant*

vs.

PANOMA CORPORATION ET AL, *Appellees*

Appeal from the Supreme Court of Oklahoma

REPLY TO MOTION TO DISMISS OR AFFIRM

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INDEX

	Page
Preliminary Statement	1–3
I. Cities Service Gas Co. v. Peerless Oil and Gas Company is not applicable here	3–8
II. The Question of Discrimination	8–13
III. The Due Process Clause	13–14
IV. The Exlusive Jurisdiction of the Federal Power Commission	14–17
Conclusion	18

CASES CITED

Cities Service Gas Co. v. Peerless Oil and Gas Co., 240 U. S. 179	3-8, 13
Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591	14
Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U. S. 498	14
Interstate Natural Gas Co. v. Federal Power Commission, 331 U. S. 682, 692	**7, 14**
Michigan-Wisconsin Pipe Line Co. v. Calvert, ... U. S. .....,	6
Milk Control Board v. Eisenberg Farm Products, 306 U. S. 346 (1939)	5
Panhandle Eastern Pipe Line Company v. Calvert, ... U. S. ....., 74 S. Ct. 396	9, 13
Parker v. Brown, 317 U. S. 341 (1943)	5
Phillips Petroleum Co. v. State of Wisconsin, ...U. S. ....., 74 S. Ct. 795	2, 6, 7, 9-13

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Preliminary Statement

Appellees do not challenge a single factual statement made by appellant in its Statement as to Jurisdiction. They do not attempt to justify the holding of the Oklahoma Commission that Natural incurs an obligation to pay Panoma 7c per m.c.f. for the raw natural gas of which Natural receives the temporary "custody" at Natural's compressor station but to which Natural does not obtain title. Nor do appellees attempt to defend the holding of the State Supreme Court that Natural does not purchase from Panoma residue gas at the meter station but purchases from Panoma raw natural gas, either at the wellhead or in the bowels of the earth. Significantly, they do not deny that the specific sale by Panoma to Natural here under considera-

tion is a "sale in interstate commerce of natural gas for resale," and that such sale is, at wholesale, to an interstate pipeline company for immediate and continuous flow through the interstate pipeline system of appellant until delivered to markets in other states, a field which Congress has preempted by the Natural Gas Act. *Phillips Petroleum Co. v. State of Wisconsin*, ... U. S. ..... (decided June 7, 1954), 74 S. Ct. 795.

Significantly, also, appellees do not deny that by its Order No. 19,702 (the Phillips order), interpreting and applying its basic price-fixing order (No. 19,514), the Commission found that Phillips Petroleum Company was complying with the basic price-fixing order when selling its residue gas to Panhandle Eastern Pipe Line Company at 4.1716c per m.c.f. since it received gross from all of the constituents of its gas an aggregate of 6.9855c per m.c.f. (which was approximately the 7c price fixed in the basic order), while in the order here appealed from, the Commission has so interpreted and applied the basic order as to find that Panoma violated the order by its sale to Natural of residue gas for 5.12c per m.c.f. even though Panoma receives from all the constituents of its gas 9.301c per m.c.f. Appellees do not cite any difference in factual situation as justification for this discriminatory application of the basic order.

Appellees amazingly assert that the validity of Order No. 19514 (the basic order) is not involved in this appeal. That is not so. Both the Commission and the state court have, in their own fashion, *applied* the basic order to the facts here involved, to-wit, the sale of residue gas by Panoma to Natural. It is their *ap-*

plication of the basic order to such sale, in the manner attempted, which is discriminatory against Natural as compared with the treatment accorded Panhandle in its purchases from Phillips, which violates Natural's rights under the Commerce Clause in that it purported to regulate a sale in interstate commerce, and which deprives Natural of the sum of $1,334,900.50 on penalty of having deliveries of residue gas in interstate commerce embargoed.

Appellees themselves in the motion describe the Panoma order as being an *enforcement* order. Clearly, the Commission is unlawfully attempting, through the Panoma order, to enforce its *basic* order dealing with the sale at the wellhead of raw natural gas to the purchase of residue gas made by Natural after the gathering operations have been completed.

I.

Cities Service Gas Co. v. Peerless Oil and Gas Company Is Not Applicable Here

In Subdivision I of such reply and motion, appellees argue that the holding of this Court in *Cities Service Gas Co. v. Peerless Oil and Gas Co.*, 240 U. S. 179, is *stare decisis* as to the application of the Commerce Clause to the transaction between Panoma and Natural. They do not contend, nor did the state court hold, that appellant has failed seasonably to invoke the protection of the Commerce Clause. The state court expressly recognized in its opinion that Natural is claiming the protection of that clause. The burden of appellees' argument seems to be that since the basic order

was sustained in *Cities Service v. Peerless*, the holding in that case is *stare decisis* as to all situations to which the Oklahoma Commission might thereafter attempt to apply such basic order through interpretative or enforcement orders, regardless of differences in factual situations.

Under Subdivision I of the motion, appellees say:

> "The validity of Order No. 19,514 of the Corporation Commission, referred to by appellant as the basic order, is not involved."

and, quoting at length from the Court's opinion in the *Cities Service* case, they argue that by such opinion, the validity of that order has been conclusively settled by this Court and is no longer open to review.

Natural does not challenge the validity of the basic order, abstractly considered, or as it was interpreted and applied in the *Cities Service case*. Its attack is on the order as it has now been interpreted and applied by the Panoma order (No. 24,745) from which order this appeal is prosecuted.

The *Cities Service* case, by the express limitation on the face of the opinion, was confined to *wellhead* sales of raw natural gas under the circumstances shown by *the record then before the Court*. That record showed that Cities Service Gas Company was a common purchaser of gas and a producer of gas, not only in the Guymon-Hugoton Field but also in other fields of Oklahoma. It was also a marketer of gas, both in Oklahoma and in other states. Cities Service, however, took possession of the raw gas purchased by it, and the raw gas produced by it in that field *at the wellhead*, then

transported such gas through its gathering lines to a gasoline plant within the state belonging to an affiliate, Cities Service Oil Company. At that plant the liquefiable hydrocarbons were extracted. The residue was then transported by Cities Service to a concentration point, in the nature of a depot, at Blackwell, Oklahoma, where such residue gas was commingled with gas from other fields. A portion of the commingled gas was then moved by Cities Service to market points within the State of Oklahoma but the greater portion thereof was transported to markets in other states.

Thus, *after* the gas was produced at the wellhead, but *before* the final movement from Blackwell to other states commenced, the raw gas was *gathered* within the State of Oklahoma; it was *processed* within the State of Oklahoma; it was *transported* within the State of Oklahoma to the concentration point at Blackwell; and at that point the gas was *commingled* in the State of Oklahoma with gas from other fields. It was the view of this Court that, as applied to the facts there involved, the case was ruled by *Parker v. Brown*, 317 U. S. 341 (1943), and *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346 (1939).

The facts here involved are entirely different from those presented in *Cities Service*. Appellant does not purchase from Panoma natural (raw) gas at the wellhead. Appellant does not purchase wellhead gas at *any* point. Appellant does not gather the gas; it does not process the gas. All appellant does is to purchase *at wholesale* the residue constituent of such gas at the inlet to its interstate pipeline, solely for transportation immediately to and resale for ultimate public con-

sumption in other states. The sale and delivery are made after the operations of producing, gathering and processing the raw gas have been completed and therefore have nothing to do with the production or gathering of natural gas.

The purchase by appellant of residue gas from Panoma is of precisely the same character as the purchases of residue gas made by Panhandle Eastern Pipe Line Company and those made by Michigan-Wisconsin Pipe Line Company from Phillips that were discussed by this Court in the opinions in *Michigan-Wisconsin v. Calvert*, ...U. S. ....., 74 S. Ct. 396, and *Phillips Petroleum Co. v. State of Wisconsin*, ... U. S. ....., 74 S. Ct. 795.

In the *Calvert* case, this Court recognized that the taking of residue gas into an interstate pipeline from the outlet of a gasoline plant, co-incidentally with the purchase of such gas at that plant, was an incident which occurred after all activities having a local aspect (producing, gathering and processing) had been completed and was therefore such an integral part of interstate commerce that it could not realistically be separated from that commerce. In *Phillips v. State of Wisconsin* this Court held that such sales were a part of interstate commerce; that their regulation was not reserved or delegated to the states by the exception of "gathering and production" from the operation of the Natural Gas Act; and that jurisdiction over the prices at such wholesale sales was vested by that Act in the Federal Power Commission.

In the *Cities Service* case this Court held that on the

record in that case it had not been shown that "on balance" the national interest was harmed by state regulation of the sales there involved (wellhead sales). In *Phillips v. State of Wisconsin* this Court, as to sales made at the outlet of gasoline plants for immediate transportation to and resale in other states, applied the following from *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, 692:

> "By the time the sales are consummated, nothing further in the gathering process remains to be done. We have held that these sales are in interstate commerce. *It cannot be doubted* that their regulation is *predominantly a matter of national, as contrasted to local, concern.*" (Emphasis supplied)

In such Subdivision I of the motion appellees assert in substance that the opinion of the state court discloses that there was not decided, nor was it necessary to decide, any Federal question in the consideration of the cause other than a "proper enforcement" of the order of the Commission (the basic order) in accordance with the opinion of the Supreme Court of the United States in *Cities Service v. Peerless.* But the question here is whether or not the order entered against Natural *is* a "proper enforcement" of that basic order in accordance with the opinion of this Court in the *Cities Service* case. This Court was careful in that opinion to limit its holding to sales made at the wellhead such as were reflected by the record in that case. Neither the Commission nor the state court can dispose of the substantial Federal questions raised by Natural in the proceeding below as soon as they could

be raised (as pointed out in Natural's Statement as to Jurisdiction) by failing or refusing to decide such constitutional questions or by erroneously claiming, without factual basic, that such questions do not exist. The question here is not whether the basic order was properly enforced against *Cities Service* under the facts involved in that case but whether it is *properly* enforced against Natural under the very different facts of this case.

II.

The Question of Discrimination

Subdivision III (there is no Subdivision II) of the motion includes a very brief reference to the discriminatory interpretation and enforcement by the Commission of the basic order as between Panoma as a producer of raw natural gas and Natural as a purchaser of the residue constituent of such raw gas so produced by Panoma, and Phillips as a producer of raw natural gas and Panhandle Eastern as a purchaser of the residue constituent of such raw gas produced by Phillips. Several inaccuracies and misleading statements are contained in that brief discussion. Thus:

(1) Appellees say:

> "The enforcement provisions of the basic order as applied to Phillips are not within the record of this appeal and may not be considered herein."

The statement is misleading and essentially untrue. The Phillips order *in its entirety* (No. 19,702) is Exhibit 15, shown at pages 240-246 of the manuscript record on file in this Court. The order contains no en-

forcement provision since the Commission held that Phillips was *not* violating the basic order.

(2) Appellees say:

> "Contrary to the contention of appellant, the Corporation Commission made no finding that the sales contract between Panoma and its purchasers was substantially identical with the contract between Phillips and its purchasers, nor did the Commission make a finding as to the aggregate receipts by either Panoma or Phillips from the sale of such gas."

Appellant has not contended that the Commission made a "finding" that the sales contract between Panoma and Natural was substantially the same as that between Phillips and Panhandle. What appellant says is that the transaction between Panoma and Natural as shown by the record in this case is of identical character as that between Phillips and Panhandle as revealed by the Oklahoma Commission in the Phillips order (No. 19,702) and as described in the opinion of the Supreme Court of Oklahoma in *Phillips Petroleum Co. v. State*, 220 P. 2d 279, 292. The contract between Phillips and Panhandle was before this court in *Panhandle Eastern Pipe Line Co. v. Calvert*, ... U. S. ....., 74 S. Ct. 396, and again in *Phillips v. State of Wisconsin*, ... U. S. ....., 74 S. Ct. 795, and there actually interpreted by this Court. This Court will judicially note the provisions of that contract since it has heretofore been interpreted by it. The Court also has in the record in this case the contract between Panoma and Natural. Comparison of the two contracts shows that

they are substantially identical. *Appellees do not deny that this is true.*

Nor has appellant contended that the Commission in the Panoma order (No. 24,745) expressly found the amount of aggregate receipts by either Panoma or Phillips from the sale of gas. However, the facts as to such receipts are fully proven in the record in the instant case and in fact are undisputed. In the Phillips order (No. 19,702, Ex. 15), the Commission stated the facts as to the disposition by Phillips of the constituents of its raw gas. A simple calculation from the facts there recited shows a total realization of 6.9855c per m.c.f. Panoma's Exhibit 14 prepared by Panoma's auditor shows that Panoma's total realization from all constituents aggregated 9.301c per m.c.f. The prices received by Phillips and those received by Panoma from the sale of residue gas are shown by those same exhibits.

(3) Appellees in their motion also say:

> "The order appealed from makes no reference to any sum of money so paid by Natural to Panoma. It simply requires payment of the minimum price of gas from and after the effective date of the basic order, No. 19,514."

Here again the facts are in the record and not disputed. The exhibit prepared by Panoma's auditor (14) shows the total sums of money that had been paid by Natural to Panoma. Exhibit 8, introduced by Panoma, shows the total volumes of raw gas produced, the dollars paid by Natural for residue gas, and the additional sum claimed to be due.

Appellees do not challenge the accuracy of the figures used by appellant. Their contention appears to be that they cannot be considered because they are not expressly contained in the Commission's order. Clearly, however, this Court cannot be deprived of the power to protect constitutional rights by the failure of a state regulatory body to make express findings as to *undisputed and controlling facts.*

(4) In the motion appellees say:

> "In its statement appellant attempts to compare the effect of the enforcement of the basic order as against Phillips Petroleum Company and the effect of the enforcement of the basic order as against Panoma by showing the net receipts from gas produced by Phillips and the net receipts from gas produced by Panoma."

That statement again is without basis in fact. There is nothing in the Phillips order (No. 19,702) or elsewhere in the record which shows the *net* receipts by Phillips. The only showing is that the *gross* receipts by Phillips amounted to 6.9855c per m.c.f., which this Court held to be a sufficient compliance with the basic 7c order. The facts in this record show without dispute that the *gross* receipts by Panoma amounted to 9.301c per m.c.f., and that its *net* receipts (after deducting all costs incurred in gathering and processing the raw gas and depreciation on the gathering system and processing plant) amounted to 7.04c per m.c.f. Thus, Panoma received 60 per cent gross more than did Phillips, and Panoma, in fact, received more net than Phillips received gross.

Appellees do not deny that these are the facts. They do not attempt to defend the obvious discriminatory treatment of Natural. If Phillips complied with the law in receiving 6.9855c gross from the constituents of its gas, it is obvious that Panhandle lawfully purchased the residue from Phillips at the price paid by it (4.1516c per m.c.f.). It is equally obvious that if Phillips complied with the basic order by receiving 6.9855c for the constituents of its gas, Panoma also complied with such basic order in receiving 9.301c gross (7.04c net) for the constituents of its gas and Natural's purchase of the residue at 5.12c was in compliance with the basic order.

Appellees cannot get away from the fact that the Phillips-Panhandle transaction and the Panoma-Natural transaction are, in effect, identical in character and that the basic order has been applied in the Panoma order in such a manner as effect a drastic and devastating discrimination against Natural as compared with its application to the Phillips-Panhandle transaction. This discrimination has a necessary effect not only on the parties to the transaction but on the consuming public in other states. Comparing the interpretative order against Natural, the stark results are as follows: Panhandle may purchase from Phillips at the outlet of a gasoline plant residue gas for interstate commerce at 4.1716c (its contract price), but Natural cannot purchase at the outlet of the Panoma plant residue gas for interstate commerce at 5.112c (its contract price), but must pay in excess of 7c. The astounding fact is that whereas Panhandle is permitted to continue to pay the contract price for residue gas only, Natural

is required to pay the price fixed by the Commission for the volume of raw gas as produced, although it in fact gets only the residue content, thus imposing on it the cost of gas lost by shrinkage in the gasoline plant by the extraction process and for use as fuel.

Appellees do not explain, and cannot explain, how the basic order of the Commission discussed in *Cities Service v. Peerless*, supra, can be validly applied to the Panoma-Natural contract in such manner as to effect this flagrant and shocking discrimination against Natural as compared with an application of such basic order to the purchaser (Panhandle) from Phillips under the contract reviewed by this Court in *Phillips v. Oklahoma*, supra, *Panhandle Eastern Pipe Line Co. v. Calvert*, supra, and *Phillips v. Wisconsin*, supra.

III.

The Due Process Clause

Appellees assert that the Due Process Clause of the Constitution has no application whatsoever and observe in support of that statement that "ample opportunity is afforded for a judicial review of the orders of the Oklahoma State Corporation Commission."

There is invariably an opportunity for state judicial review of a regulatory order. This review applies not only to procedural matters but also to questions of substantive rights. Natural instituted its review proceeding before the Supreme Court of Oklahoma, and, failing there (5 to 4) to obtain relief, is now before this Court to obtain protection of its constitutional rights in a substantive sense by an effective judicial

review of the Commission's order which clearly violates Natural's rights in a substantive sense under the Due Process Clause.

IV.

The Exclusive Jurisdiction of the Federal Power Commission

In Section III of the motion, appellees, after quoting extensively from *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, and *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, state:

> "Appellant contends that this line of authorities was superseded by this court's decisions in Michigan Wisconsin Pipe Line Company v. Calvert, 73 S. Ct. Rep. 396, and Phillips Petroleum Company v. State of Wisconsin, 74 S. Ct. Rep. 795."[1]

and conclude:

> "The decisions make it clearly apparent that we have two types of regulation, each covering its separate field. First, state regulation covering the production and gathering of natural gas. This is done to effect conservation and to eliminate waste; fixing minimum prices is within this power left to the states.
>
> "Second, regulation of the transportation and sale of natural gas, including its sale price to consumers throughout the United States is within

[1] Natural has never made such a contention.

the province and jurisdiction of the Federal Power Commission."[2]

Based on these asserted separate fields of regulation, appellees argue that the order here involved, fixing the price of one constituent of natural gas where sold in interstate commerce, is a regulation of production and, therefore, within the state's jurisdiction.

This contention is clearly in conflict with the doctrine of *Phillips v. Wisconsin*. In that case Phillips was held to be a natural gas company and its prices for residue gas sold for interstate transportation to be exclusively within the jurisdiction of the Federal Power Commission. In both the majority opinion and the concurring opinion in that case, it was recognized that the purpose of Congress in enacting the Natural Gas Act was to occupy the field in which it had been held the states may not act, namely, sales for resale (wholesale sales) made in interstate commerce.

This Court held that sales made by Phillips at the outlets of gasoline plants are within that field and, therefore, are under the jurisdiction of the Federal Power Commission. This is necessarily true also as to the sales of identical character made by Panoma to Natural.

Appellees do not even suggest that there is any distinction on the facts between Phillips' sales to Panhandle and Panoma's sales to Natural; none can be made. In each case the producer produces the gas,

[2]The Federal Power Commission, of course, has no jurisdiction over the sale price to "consumers." Its jurisdiction is over sales for resale (wholesale sales made in interstate commerce.)

gathers it to a gasoline plant, and processes it for the extraction of gasoline, and, after that has been done, makes the sale of the residue constituent of its gas at wholesale for immediate interstate movement.

In the preamble to the Natural Gas Act (15 U.S.C., Sec. 717), it is expressly stated that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest; that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate commerce is necessary in the public interest. It is declared that the provisions of the Act shall apply to the transportation of natural gas in interstate commerce and

> ". . . . to the sale in interstate commerce of natural gas for resale for ultimate public consumption domestic, commercial, industrial, or any other use . . . ."

Appellees cannot deny, under the facts, that the sale of residue gas by Panoma to Natural is such a sale, namely, a sale in interstate commerce. Nor can it be denied that the basic order of the Commission, as interpreted and applied by Order No. 24,745, *imposes a direct burden* on that sale.

This Court has held in the *Phillips Petroleum Co. v. State of Wisconsin*, supra, that Congress has vested sole jurisdiction to determine the reasonableness of the prices charged at such sales in the Federal Power Commission. It has "preempted the field" even if, in the absence of action by Congress, a field for state action existed.

The argument of appellees is that the basic order was one for the prevention of physical and economic waste, and has been sustained by the *Cities Service* case. In *Phillips Petroleum Co. v. Wisconsin*, supra, the Court said:

> "We are of the opinion . . . . that production and gathering, in the sense that these terms are used in §1 (b), end before the sales by Phillips occur."

Elsewhere in the opinion in that case, the Court said:

> "The Federal Power Commission did not participate in the *Cities Service* and *Phillips Petroleum* cases, the appellants there did not assert a possible conflict with federal authority under the Natural Gas Act, and consequently we expressly refused to consider at that time 'whether the Gas Act authorizes the Power Commission to set field prices on sales by independent producers, or leaves that function to the states . . . .' "

Whatever the scope of the *Cities Service* case, it is now clear that a sale of residue gas at the outlet of a gasoline plant is controlled exclusively by federal authority under the Natural Gas Act, and that state regulation for any cause is excluded from that field.

It is no answer to say, as appellees apparently argue, that the order applies to production and is applied only to producers. It *fixes the price* which *Natural must pay* at the outlet of Panoma's gasoline plant for one of the constituents (the residue) of the raw gas; and, if Natural fails to pay that price, it loses its supply of gas for interstate shipment.

CONCLUSION

Without question, the Oklahoma authorities have tremendously discriminated against Natural in their treatment of the sales of residue gas from Panoma to Natural, as compared with the treatment accorded similar sales by Phillips to Panhandle, in each case the sales in interstate commerce. Further, the sale by Panoma to Natural, being a part of interstate commerce, is not within the state's regulatory powers. Such regulation is within the exclusive jurisdiction of the Federal Power Commission which, as held by this Court in *Phillips Petroleum Co. v. State of Wisconsin*, supra, possesses full power and sole authority to regulate the price of residue gas sold at wholesale at the outlet of a gasoline plant for movement in interstate commerce.

Appellees' motion should be denied.

Respectfully submitted,

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